

In the Matter of the Arbitration	:	
	:	AAA Case No.
between	:	14 20 1300 1656 13
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CITY OF PHILADELPHIA,	:	Opinion & Award
	:	
“City”	:	Re: Discharge of
	:	Gerald Passalacqua
- and -	:	
	:	Hearing: May 19, 2014
	:	
F.O.P, LODGE NO. 5.	:	
	:	
“Union”	:	
	:	

### For the City

## For the Union

**BEFORE:** David J. Reilly, Esq., Arbitrator

## BACKGROUND

The Department discharged Police Officer Gerald Passalacqua effective November 7, 2013. It took this action after a Police Board of Inquiry found him guilty of violating the following sections of the Department Disciplinary Code: (1) Conduct Unbecoming an Officer, Section 1-§010-10 (lying or attempting to deceive regarding a material fact during a Department investigation); (2) Disobedience, Section 6-§007-10 (failure to follow Department procedures for handling monetary evidence); and (3) Disobedience §6-§808-10 (discharging, using, displaying or handling of a firearm contrary to Department policy). (Joint Exhibits 2 & 3; City Exhibit 8.)<sup>1</sup> All of the charges stem from Passalacqua's actions during the search of a residence on September 26, 2012, and his subsequent statements in connection with a related investigation by the Department's Internal Affairs Division ("IAD"). The Union contends the City lacked just cause to impose this discipline. It asks that Passalacqua be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly:

At the time of his discharge, Passalacqua had been a member of the Department for nearly twenty years. He has no record of prior discipline.

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<sup>1</sup> The Union represents that it has not accepted the current Disciplinary Code, but maintains instead that the Department implemented it unilaterally in 2010. It notes that the implementation of the Code is the subject of an unfair labor practice charge pending before the Pennsylvania Labor Relations Board. In addition, it points out that the Act 111 Board of Arbitration has ruled that notwithstanding the terms of the Code, disciplinary arbitrators are empowered to determine the appropriateness of the penalty imposed by the City in any instance in which just cause to discipline is found.

The circumstances leading to Passalacqua's discharge arose from the events of September 26, 2012.

Sergeant T [REDACTED] M [REDACTED], assigned to the Department's Narcotics Field Unit ("NFU"), testified that on that day, he received a call from Passalacqua, a member of his squad, advising that he had received a request for assistance from Police Officer K [REDACTED] C [REDACTED]. According to M [REDACTED], Passalacqua explained that G [REDACTED] and his partner, J [REDACTED] O [REDACTED], in responding to a report of shots fired at a Latona Street residence, had discovered illegal narcotics and United States currency and asked for his help in obtaining a search warrant. M [REDACTED] recounted that he advised Passalacqua to meet him at the location together with his fellow squad members, Police Officers C [REDACTED] S [REDACTED] and B [REDACTED] C [REDACTED]. M [REDACTED] also recalled informing Passalacqua that S [REDACTED] would be the "assigned officer" because Passalacqua had already served as the assigned officer on two jobs earlier that day. He related that in a separate conversation, he notified S [REDACTED] of this designation.

M [REDACTED] explained that in NFU, the assigned officer has responsibility for collecting and recording all evidence seized on a job, as well preparing all required documentation. In the event of a subsequent trial, the assigned officer serves as the State's witness in testifying as to such evidence collection.

M [REDACTED] recounted that he was the first member of his squad to arrive at the Latona Street residence, whereupon he met with C [REDACTED] and O [REDACTED]. After first obtaining some background information, he accompanied G [REDACTED] and O [REDACTED] to the front bedroom on the second floor where they had observed illegal narcotics and a significant quantity of money. M [REDACTED] recalled seeing both narcotics and a cosmetic bag

containing a large quantity of cash located on a table near the bed, and an open purse lying on the bed in which cash was also visible.

Advising G [REDACTED] and O [REDACTED] that he wanted to get a "quick count" of the money present in the room, M [REDACTED] related that he counted the currency in both the cosmetic bag and the purse, and reported that they contained \$1,200 and \$200, respectively.<sup>2</sup> He then restored the currency and returned the cosmetic bag and purse to their original locations. He also recalled confirming with the female occupant of the residence, who was in custody on the first floor, that the currency on the second floor totaled approximately \$1,200. At this point, M [REDACTED] stated, he left the house and proceeded to his vehicle to obtain evidence bags.<sup>3</sup>

M [REDACTED] related that while there, he observed Passalacqua, C [REDACTED] and S [REDACTED] arrive. He recounted that Passalacqua and C [REDACTED] entered the residence while he spoke with S [REDACTED] to brief him on the job. According to M [REDACTED] he then returned to the residence and proceeded to the second floor front bedroom. Upon entering and noticing currency strewn on the bed, he asked Passalacqua and G [REDACTED] the only two present there, why they had touched the money. Passalacqua replied that he had done so because all the currency was going to be put on a single property receipt.

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<sup>2</sup> M [REDACTED] stated that, as a matter of practice, he performs a quick or rough count whenever currency is discovered at a scene that has not yet been secured, as was the case here at the Latona Street residence. He explained that doing so ensures that all police personnel and suspects at the location are "on the same page." At the same time, it does not obligate him to testify in subsequent court proceedings. Such duty to appear as a witness rests with the assigned officer who performs the official count when making the actual seizure of the currency. In his testimony, former NFU Commanding Officer, Captain Gregory Malkowski, confirmed this practice.

<sup>3</sup> In his testimony, O [REDACTED] confirmed M [REDACTED]'s account of his actions in all material respects. G [REDACTED] testified similarly with certain exceptions. He stated that M [REDACTED] only counted the currency in the cosmetic bag. He also had no recollection of M [REDACTED] confirming his count with the female occupant of the residence. Finally, he recounted that M [REDACTED] after counting the currency, stated he needed to retrieve a camera, as well as evidence bags, from his car, explaining that he wanted to photograph the narcotics and currency as they appeared when originally discovered. O [REDACTED] averred that he did not hear M [REDACTED] mention a camera, but only that he needed to obtain evidence bags from his car.

Examining the currency more closely, M █████ realized that several \$100 bills were missing from his prior count. He recalled that he began second guessing himself, so he confirmed his prior count with G █████ and O █████<sup>4</sup> as well as with the female occupant.<sup>5</sup>

Once he had done so, he directed C █████ and O █████ to leave the bedroom, and then informed Passalacqua of the missing money and questioned, "What's going on? He related that Passalacqua responded defensively, "I can't believe you would think like that." At the same time, according to M █████, Passalacqua turned down the waistband of his shorts and turned the pockets inside out. M █████ recounted that he directed him to stop immediately and then called G █████, O █████, S █████ and C █████ into the room. After informing the officers of the missing money, he asked if any of them had an explanation. When none was offered, he advised that he would need to notify his Lieutenant, T █████ W █████ as well as IAD.

In recounting his actions at the Latona Street residence, Passalacqua testified that after entering the premises, he approached G █████ and O █████ on the first floor, and inquired. "What do you got?" He recalled that after some discussion concerning their basis for probable cause, the three of them proceeded to the second floor where he and G █████ entered the front bedroom. According to Passalacqua, after G █████ pointed out the cosmetic bag and the narcotics on the table and the purse on the bed, M █████ came into the room and announced that they were going to confiscate all items in "plain view."

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<sup>4</sup> According to M █████, O █████ had returned to the bedroom as he was examining the currency on the bed.

<sup>5</sup> Both G █████ and O █████ denied that M █████ asked them to confirm his prior count of the currency.

When Passalacqua questioned if they would not be obtaining a warrant, M ██████ replied, “Yes, we’ve got enough. I am going for evidence bags.”<sup>6</sup>

He recounted that in view of that decision, he directed G ██████ to look under the bed for other any other evidence to be seized.<sup>7</sup> He described that G ██████ got down on all fours and worked his way around the bed. Given the small size of the room and the proximity of the bed to the wall, he assisted G ██████ as he did so by lifting the bed quilt so that he could see underneath the bed. This process took approximately a minute to complete.

According to Passalacqua, he then flipped over the cosmetic bag and the purse emptying the currency contained in each onto the bed.<sup>8</sup> He explained that he did so because, as a matter of practice when seizing currency, the squad does not to confiscate the container(s) in which it is found, but instead removes the currency and places it in clear plastic evidence bags. He stated further that with M ██████ having declared the job to be a plain view seizure, it was unnecessary to have S ██████ perform this function as the assigned officer as there would not be any search warrant documentation to prepare.

Passalacqua reported that when M ██████ again returned to the room and observed the currency on the bed, he questioned, “What are you doing?” According to

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<sup>6</sup> M ██████ denied making this statement, testifying that it was his intent to obtain a search warrant in order to conduct a full search of the residence. He explained that when drugs and money are discovered in a residence, he almost always proceeds in this manner.

<sup>7</sup> Initially, Passalacqua could not recall O ██████’s location once he and G ██████ entered the front bedroom on the second floor. However, after recounting M ██████’s plain view instruction, he acknowledged that he might have instructed O ██████ to check the other rooms on the second floor in order to collect any evidence in plain view. According to O ██████, Passalacqua gave this instruction as soon as they reached the second floor and reaffirmed it despite his representation that he had already conducted such a check. G ██████ confirmed that Passalacqua issued this instruction, but had no knowledge of his reason for doing so.

<sup>8</sup> G ██████ testified that when he stood up after inspecting under the bed, he noticed that the currency had already been emptied on to the bed. He also reported observing a cell phone and a television remote control lying on the bed along with the purse.

Passalacqua, he responded that he had taken this action because he understood all of the currency was going to be placed into evidence bags and recorded on a single property receipt. At this point, M [REDACTED] began counting the money and then suddenly remarked, "Whoa, whoa, something is wrong here." When Passalacqua asked him to explain, he replied, "There's a lot of money missing," and then directed G [REDACTED] and O [REDACTED] to leave the room.

Alone in the room with M [REDACTED], Passalacqua questioned, "Do you think I took the money?" Stating he wanted to show M [REDACTED] that he was "legit," he then completely disrobed with the exception of his underwear. He described removing each article of clothing and turning it inside out, and taking off his sneakers and removing the orthotics. Ultimately, he lowered his underwear to his knees allowing M [REDACTED] to view his genitals. According to Passalacqua, M [REDACTED] at this point, nervously stated, "I did not tell you to do that," and then directed him to re-dress.

Similar to M [REDACTED]'s account, Passalacqua related that he then called in G [REDACTED], O [REDACTED], S [REDACTED] and C [REDACTED], advised them of the missing money and requested an explanation. When none was provided, he stated that he was calling W [REDACTED] and IAD, and escorted all of the officers to the first floor. Passalacqua reported that he and the others left the residence and remained outside until W [REDACTED] additional supervisors and representatives from IAD arrived.

Passalacqua recounted that some time later, upon request, he returned to the residence. Accompanied by W [REDACTED], Captain J [REDACTED] K [REDACTED] of NFU, and Sergeant Jacob Williams of IAD to a second floor bathroom, he submitted to a full strip search. He

reported that after no money was found on his person, he re-dressed and again left the residence. He also noted that K ■■■ took his weapon.

Lieutenant Lorraine Dusak of IAD testified that she along with Williams was assigned to investigate this matter as involving a possible theft.<sup>9</sup> She stated that in doing so, they interviewed all of the officers present at the scene, as well as the female occupant of the residence. (City Exhibits 1 – 6.)<sup>10</sup> Ultimately, she stated, the investigation did not substantiate that Passalacqua had stolen the missing money. However, she did find that he had been untruthful during his IAD interview based upon discrepancies between his account and those provided by the other officers. In particular, she cited his claim that he had completely stripped in M ■■■'s presence, whereas M ■■■ reported that he had only turned his pockets inside out and lowered his waistband. In addition, she reported that her investigation substantiated that Passalacqua had mishandled monetary evidence and was carrying an unauthorized weapon while at the Latona Street residence.

On the basis of these findings, the Department, on May 24, 2013, formally charged Passalacqua with violating Disciplinary Code Sections 1-§009-10, 6-§007-10 and 6-§008-10, as detailed above. (City Exhibit 8.) After he was found guilty of all three Charges at a Police Board of Inquiry hearing, Commissioner Charles Ramsey discharged him effective November 7, 2013. (Joint Exhibit 2.)

Passalacqua's discharge prompted the instant grievance. When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union

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<sup>9</sup> She reported that officers executing a search and seizure warrant early the following morning discovered \$880.00, the approximate amount of the missing money, in between the cushions of a love seat located in the living room of the residence. Testing of this currency proved inconclusive for the presence of Passalacqua's DNA and did not reveal his fingerprints.

<sup>10</sup> D ■■■ also reported receiving a copy of an email that Passalacqua had sent to M ■■■ on September 28, 2012 concerning this matter. (City Exhibit 7.)



demanding arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing in this case on May 19, 2014, at the offices of American Arbitration Association in Philadelphia, PA. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, the record was held open for the parties to submit post-hearing briefs. With the receipt of those briefs on July 10, 2014, I declared the hearing record closed as of that date.

## **DISCUSSION AND FINDINGS**

### **The Issue:**

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer Gerald Passalacqua, effective November 7, 2013?
2. If not, what shall be the remedy?

### **Positions of the Parties**

The City contends that its discharge of Passalacqua was for just cause. It maintains that the evidence conclusively demonstrates that he is guilty of each of the charged offenses.

It avers that the testimony and documentary evidence establish that Passalacqua made false statements in his IAD interview. It reasons that Passalacqua's false statements are evident based upon: inconsistencies between his IAD statement and those given by the other witnesses; inconsistencies in his testimony here; and his motive to be dishonest. Passalacqua's false statements to IAD, it maintains, include the following: (1)

claim that he was the assigned officer on the Latona Street job; (2) denial that he sent O [REDACTED] to check the other second floor bedrooms while he and G [REDACTED] remained in the front bedroom; (3) assertion that M [REDACTED] declared Latona Street job a plain view seizure; (4) contention that he completely stripped for M [REDACTED] and (5) declaration that it was not M [REDACTED]'s practice to perform an initial "rough count" whenever there is monetary evidence to be collected.

Turning to Passalacqua's testimony here, it maintains that his many flip flops and obvious inconsistencies further exposed his lack of credibility, including: (1) his changed account in which he acknowledged knowing he was not the assigned officer on the Latona Street job; (2) his modified recollection of possibly giving instructions to O [REDACTED] in which he conceded it would not have been unlike him to direct O [REDACTED] to check the other rooms; (3) his inability to explain his performance of the assigned officer duties despite acknowledging he was supposed to support S [REDACTED] in performing those tasks ; (4) his equivocation in identifying M [REDACTED]'s location when he (Passalacqua) dumped the money onto bed; and (5) his claim that a plain view search permitted examining under the bed even though the bed quilt had to be lifted to do so.

It submits that by having established that Passalacqua lied in his IAD interview, it necessarily follows that it had just cause to discharge him.

It argues further that the evidence conclusively demonstrates that Passalacqua is also guilty of the other two Charges; namely, mishandling evidence and carrying an unauthorized firearm on duty. Indeed, it highlights that by his testimony here, Passalacqua admitted as much. Finally, it avers that given gravity of the misconduct covered by these Charges, they, too, warranted a penalty of discharge.

Accordingly, for all these reasons, the City asks that Passalacqua's discharge be sustained and the Union's grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Passalacqua. It submits that the City has failed to meet its burden of demonstrating that he is guilty of the charged offenses.

As a preliminary matter, it argues that the standard of proof to be applied here should be the criminal standard of "proof beyond a reasonable doubt" as opposed to the civil standard of "a preponderance of the evidence." It submits there is ample authority for imposing the former standard in discharge cases where the cited basis involves criminal or quasi-criminal conduct. *See S.D. Warren Co.*, 89 L.A. 688, 702 (S. Gwiazda 1985); Elkouri & Elkouri, *How Arbitration Works* 906-908 (Alan Ruben ed., 2003). This principle, it reasons, applies with even greater force in the context of this case inasmuch as the City is a "state actor" and its discharge of Passalacqua represents an exercise of "the powers of the state." Alternatively, it maintains that at a minimum, the City should be required to provide "clear and convincing evidence" to substantiate that it had just cause to discharge Passalacqua. *See Wayne State University*, 87 L.A. 953, 956 (N. Lipson 1986) (held clear and convincing standard applicable because a determination that grievant engaged in the charged criminal conduct would not only involve a disposition of his employment rights, but carry a social stigma as well).

Turning to the merits, it maintains that the City has failed to prove that Passalacqua provided any untruthful statements during his IAD interview. Citing D [REDACTED]'s testimony, it stresses that her substantiation of this charge rests upon her finding that M [REDACTED]'s account of the events at the Latona Street job should be credited over that

provided by Passalacqua. It contends that upon examination of the evidence presented, there is absolutely no basis for this determination by D [REDACTED].

It asserts that D [REDACTED]'s credibility determination is inherently flawed inasmuch as she performed a very selective analysis in which she focused only upon inconsistencies and conflicts between Passalacqua's recitation of the facts and that offered by M [REDACTED], G [REDACTED] and O [REDACTED]. As such, she ignored obvious inconsistencies between the statements of M [REDACTED], G [REDACTED] and O [REDACTED]. Simply put, it concludes that the City cannot meet its burden of proving just cause by placing determinative weight on certain inconsistencies while at the same time conveniently disregarding others that are not supportive of its theory of the case.

Reviewing the testimony of M [REDACTED], G [REDACTED] and O [REDACTED] it highlights that such inconsistencies and conflicts overlooked by the City include: (1) G [REDACTED] testified that M [REDACTED] upon completing his rough count of the money, stated he needed to retrieve a camera from his vehicle, whereas, M [REDACTED] denied making any such statement; (2) M [REDACTED] reported counting the currency contained in both the cosmetic bag and the purse, while G [REDACTED] stated he counted only the currency in the cosmetic bag; (3) M [REDACTED] and G [REDACTED] provided conflicting descriptions of G [REDACTED]'s reaction upon being advised of the missing money; (3) G [REDACTED] and O [REDACTED] in conflict with M [REDACTED], stated that after discovering that money was missing, he never asked them to confirm his prior quick count; (4) M [REDACTED], in conflict with his IAD statement, testified that upon returning to the bedroom and seeing the money on the bed, he immediately realized there were several one hundred dollar bills missing; (5) discrepancies between M [REDACTED]'s IAD statement and his testimony here concerning Passalacqua's actions in attempting to remove his clothing;

and (6) M [REDACTED] and O [REDACTED]'s conflicting statements as to whether O [REDACTED] returned to the bedroom after the initial search for the missing money.

Finally, it asserts that D [REDACTED]'s reliance upon Passalacqua's September 28, 2012 email to M [REDACTED] in substantiating this Charge was wholly improper. (City Exhibit 7.) It explains that this email was not prepared or produced "during the course of any Departmental investigation." As such, it does not bear upon, and the City cannot use it as evidence to prove Passalacqua's guilt of violating of Disciplinary Code Section 1-§009-10 (i.e., lying or attempting to deceive during a Departmental investigation).

Turning to the Charge that Passalacqua violated Department procedure in handling monetary evidence at the Latona Street job, it avers that the City's proof fails here too. The City, it stresses, has neglected even to articulate or identify the Department procedure he allegedly violated. It argues further that under the circumstances, the City cannot maintain that Passalacqua's handling of the money was improper because S [REDACTED] and not Passalacqua, was the assigned officer on this job. Indeed, it points out that this claim is rebutted by M [REDACTED]'s admitted handling of this money to perform a "quick count" before S [REDACTED] arrived at the scene.

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

### Opinion

The Charges that the Department has brought against Passalacqua, no doubt, allege very serious misconduct. Indeed, they concern breaches of some of his most fundamental duties as a police officer. The most grave of these is the Charge of lying

during a Departmental investigation. If true, it destroys his credibility, and thereby precludes him from testifying in court.

The City, to be sure, carries the burden of proof here. It bears responsibility for establishing that Passalacqua is guilty of the Charges levied against him, and if so, that the penalty imposed was appropriate. The Union, on the other hand, does not carry a parallel burden. It has no obligation to prove he is not guilty. Indeed, Passalacqua is fully entitled to the presumption of innocence.

The Union raises a question as to the appropriate standard of proof to be applied in this case. Traditionally, in labor arbitrations involving discipline or discharge, arbitrators have applied the test of whether the preponderance of the evidence serves to establish the grievant's guilt. The Union asserts, however, that a stricter standard should be applied here because the charges allege criminal or quasi-criminal conduct. For this reason, it maintains that I should hold the City to the criminal standard of "proof beyond a reasonable doubt," or, at the very least, the heightened "clear and convincing evidence" standard.

The Union's argument certainly has an appeal. Nonetheless, on balance, I see no reason to deviate from the normal arbitral "preponderance of the evidence" standard. It is a test that has served countless employers and unions well for decades.

Turning to the merits, the Charges against Passalacqua allege: (1) he lied during his IAD interview concerning the possible theft of money at the Latona Street job; (2) he violated Department policy in handling monetary evidence on that job; and (3) he was carrying an unauthorized firearm and left his service weapon unattended in a police vehicle. On review of the record and the arguments presented, I am persuaded that the

City has satisfied its burden of establishing that Passalacqua committed each of these offenses. My reasons follow.

By the terms of Department Disciplinary Code Section 1-§009-10, the City's burden of establishing that Passalacqua violated this section requires a showing that he knowingly provided false information during his IAD interview. For this reason, the mere identification of discrepancies between Passalacqua's IAD statement and those provided by the other officers present at the Latona Street job is insufficient to establish this Charge. Correspondingly, similar discrepancies in or between the accounts provided by these other officers do not conclusively refute this Charge. Indeed, such discrepancies may simply reflect differences in perception and focus or the vagaries of human memory, and thus, are not definitive proof that the affiant lied. Simply put, sustaining this Charge requires proof of an actual intent to deceive.

Judged by this standard, I am satisfied that Passalacqua lied in two respects in his IAD interview.

First, on review, I conclude that his account of stripping in front of M [REDACTED] constituted a fabrication. It is obvious to me from Passalacqua and M [REDACTED]'s testimony that this aspect of their interaction during the Latona Street job was of considerable significance to them both, and, as such, left a definite and lasting memory. Indeed, Passalacqua made clear in his IAD statement, and again in his testimony here, that this was no passing matter, as he very precisely described his step-by-step actions in removing each article of clothing, turning it inside out and showing it to M [REDACTED] as well as lowering his underwear to his knees and exposing his genitals. Further, their versions of this event stand in such stark contrast to one another that the discrepancies cannot be

attributed to differences in their recollection. Instead, it can mean only that one was telling the truth and the other was not.

I am satisfied that M [REDACTED] was the truthful one. I found his testimony on this matter to be clear, consistent and convincing. At no point did, it vary. Nor did it change from his IAD statement. Further, there is no evidence that he held any animus towards Passalacqua or had any other motivation to be less than truthful in this aspect of his account. I accept his version.

In contrast, it strikes me that Passalacqua had strong motive to alter the facts in his own favor by falsely claiming to have completely stripped in M [REDACTED]'s presence. Indeed, this act was essential to divert the suspicion he understood had fallen upon him concerning the missing money. The strip search subsequently performed by W [REDACTED], K [REDACTED] and Williams could not serve this purpose because it could not eliminate the possibility that the money had been disposed of during the intervening period.<sup>11</sup>

Second, I find that Passalacqua attempted to deceive by informing IAD that M [REDACTED] had declared that the Latona Street job would be a "plain view" seizure; a fact that M [REDACTED] denied. Here again, the point in dispute is no minor matter as to which differences in recollection would be understandable. Indeed, it concerned the very purpose for which M [REDACTED]'s squad had been called to the Latona Street residence. Therefore, it necessarily follows from this deviation in their statements that one of them was being intentionally deceptive. I am convinced that one was Passalacqua.

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<sup>11</sup> I note that Passalacqua was never charged with theft in connection with the missing money. Indeed, the IAD investigation failed to substantiate that he was guilty of doing so. As such, in deciding this Charge, I give no consideration, direct or indirect, to any allegation or suggestion that Passalacqua had any role as to the disappearance of the money. However, I do recognize that Passalacqua's awareness that he was under suspicion in connection with the missing money is relevant to assessing whether he made knowingly false statements to IAD.



Passalacqua's assertion in this regard, which was not corroborated by a single other officer present at the scene, simply defies logic. Indeed, he offered no rational explanation for M█████ taking such action. To the contrary, M█████'s testimony stands unchallenged that his uniform practice is to obtain a search and seizure warrant whenever he and his squad discover illegal narcotics and currency in a residence, as was the case here. Finally, I note Passalacqua's obvious self-interest in making this claim; namely, to justify his handling of the money in the second floor bedroom despite not being the assigned officer.

In sum, the evidence presented plainly substantiates that Passalacqua lied in his statement to IAD.

Turning to the second Charge, I am persuaded on the record established that Passalacqua, as alleged, failed to follow Department procedure in handling the monetary evidence at the Latona Street job.

It is undisputed that while in the second floor bedroom with G█████, Passalacqua emptied the currency from both the cosmetic bag and the purse onto the bed. Indeed, he conceded as much. He also acknowledged that he understood that he was not the assigned officer on this job, as M█████ had delegated that role to S█████. Therefore, under the procedure detailed by M█████, Passalacqua usurped S█████'s role in handling this currency, and thereby, violated protocol.

I find Passalacqua's efforts to show otherwise unpersuasive. His attempt to justify his handling of the currency by citing M█████'s order of a plain view seizure necessarily fails. Indeed, as detailed above, I find there was no such order. M█████'s intent at all times was to proceed with obtaining a search and seizure warrant, and, as

such, only S [REDACTED] as the assigned officer, and not Passalacqua, was authorized to handle this currency.

Passalacqua's alternative explanation is similarly lacking in credibility. He claimed that, in practice, his unit works as a team, meaning that on any job, various members of the squad may perform tasks of the assigned officer, although the documentation is prepared as reflecting that all such tasks were performed by the assigned officer. No corroboration was presented to support this bald claim. Indeed, although C [REDACTED] another member of the squad testified here, he offered no supporting testimony.

Accordingly, I am satisfied that Passalacqua is guilty of the Charge of violating Department Disciplinary Code Section 6-§007-10.

As to the third and final Charge of carrying an unauthorized firearm while on duty, the relevant facts are not in dispute. Both in his IAD statement and his testimony here, Passalacqua admitted that the weapon that he was carrying while at the Latona Street job, and which he surrendered to K [REDACTED], was not his service weapon. (See City Exhibit 5 at 12.) In addition, he acknowledged that he understood it was a violation of Department procedure to carry such an unauthorized weapon while on duty. In view of these admissions, I am compelled to conclude that Passalacqua is guilty of this Charge.

Having found Passalacqua guilty of all three of the instant Charges, there remains only the issue of whether discharge is the appropriate penalty for his established misconduct in light of all the relevant circumstances. On review, I conclude that the answer is yes.

In reaching this result, I place greatest weight on Passalacqua's guilt on the first Charge. As stated above, by lying to IAD, Passalacqua rendered himself an unreliable witness, thus precluding him from testifying in court in future. By so compromising his ability to perform his duties as a police officer, I cannot conclude that the penalty of discharge was unwarranted here.

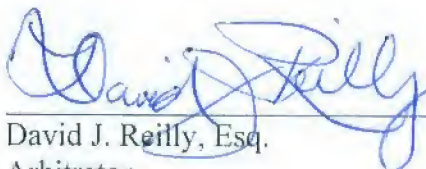
I am, of course, mindful of Passalacqua's considerable tenure with the Department and his otherwise unblemished disciplinary record. However, I do not find these factors sufficient to mitigate the penalty of discharge in this case given the gravity and circumstances of his offenses. His intentional making of deceptive statements during his IAD interview represented a very deliberate and willful choice on his part. As such, he must now accept the consequences of that misconduct, namely discharge.

Accordingly, for all these reasons, the Union's grievance is denied.

## AWARD

1. The City had just cause to discharge Gerald Passalacqua, effective November 7, 2013.
2. The grievance is denied.

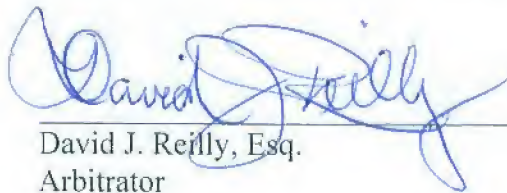
August 11, 2014

  
David J. Reilly, Esq.  
Arbitrator

STATE OF NEW YORK     )  
                                      )  
COUNTY OF NEW YORK   )     ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

August 11, 2014

  
David J. Reilly, Esq.  
Arbitrator